United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B Pls

74-1311

Original w/ Certif. of Service

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 74-1311

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellants-Appellees,

-against-

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, JR., individually and as Chief of Engineers, Corps of Engineers, U.S. Army, and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U. S. Army,

Defendants-Appellants,

-and-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

CROSS-APPEALS

BRIEF OF SCENIC HUDSON, THE HUDSON RIVER FISHERMEN, THE SIERRA CLUB and THOMAS R. LAKE, ON APPEAL AND ON CROSS APPEAL

Dated: April 22, 1974

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INTRODUCTORY STATEMENT

This brief is submitted on behalf of Scenic Hudson Preservation Conference, the Hudson River Fishermen's Association, the Sierra Club and Thomas R. Lake ("Plaintiffs") in answer to Consolidated Edison Company's brief on appeal, and in support of plaintiffs' cross appeal.

By its appeal, Con Edison seeks the right to discharge (i.e., dump)some 47,000,000 cubic feet of waste rock and other fill material into the Hudson River at Storm King Mountain without complying with the Federal Water Pollution Control Act Amendments of 1972. The District Court, by Judge Lasker, held that a discharge permit under Section 404 of the Amendments was prerequisite and enjoined the Company from filling in the 40 acres of the River it proposes unless and until such a permit is obtained. At the same time, the District Court concluded that a dredging permit under Section 10 of the Rivers and Harbors Act of 1899 was not required for the operations at Storm King, and rejected the plaintiffs' claims in this regard. Con Edison subsequently appealed the Sections 404 holding, and plaintiffs have cross appealed on the rejection of their Section 10 claims and the limited scope of injunctive relief granted by the District Court.

Con Edison filed its brief on appeal, limited to the Section 404 issue, on March 22, 1974. This brief sets forth in Point One below the plaintiffs' answer to the Company's contentions. In addition, in accordance with the stipulation of the parties approved by this Court on March 20, 1974, plaintiffs also set forth in Points Two and Three below, their arguments in support of their cross appeal.

ISSUES PRESENTED FOR REVIEW

The principal issues presented for review on this appeal derive from Con Edison's claim that because the Federal Power Commission has licensed its proposed pumped storage project at Storm King Mountain, the Company need not comply with the laws that Congress has passed to control water pollution and protect against the environmental damages of filling. The issues are as follows:

1. When Congress, through enactment of the Federal Water Pollution Control Act Amendments of 1972, has made it unlawful to discharge waste rock and other fill material into navigable waters except -- and solely except -- as authorized by a permit issued under Section 404 of the Amendments, can Con Edison nonetheless discharge millions of cubic feet of such rock into the Hudson without a 404 permit on the theory that there is somehow a further, silent exception for discharges from FPC-licensed projects?

2. If, as the District Court held, a Section 404 permit is required for the discharges of fill material that Con Edison proposes at Storm King, then prior to obtaining the permit ought not the Company to be enjoined from creating, as well as discharging, the fill material lest the required decision under Section 404 be influenced

by prior, irreversible commitments of funds?

3. When Section 10 of the Rivers and Harbors Act of 1899 requires a Corps of Engineers' permit for dredging and filling operations in navigable waters, and when both Con Edison and the Corps recognized the Section 10 requirements as applicable to the Storm King plant in 1965, can the Company nonetheless dredge and fill now without such a permit on the theory that, as applicable to hydroelectric projects, the Corps' Section 10 jurisdiction was transferred to the FPC in 1920?

STATEMENT OF THE CASE

A. Nature of the Case

This case involves cross appeals by Con Edison and plaintiffs from a final judgment of the District Court, Southern District of New York, Lasker, J., pursuant to 28 U.S.C. §1291. Con Edison appeals from the portion of the judgment which has enjoined it from discharging rock and other fill material into the Hudson River unless and until it obtains a permit under Section 404 of the Federal Water Pollution Control Act Amendments of 1972. Plaintiffs cross appeal from the judgment insofar as it declared that

Con Edison requires no permits under Section 10 of the Rivers and Harbors Act of 1899, and also from the limited scope of the injunctive relief that was granted. The judgment, which was entered on January 7, 1974, is reproduced at R. 159a of the Joint Appendix , and Judge Lasker's opinion is reproduced at R. 135a*.

B. Statement of Facts and Proceedings Below.

In 1972, Congress enacted into law, over the veto of the President, what was unquestionably the most comprehensive legislative effort in the country's history to control water pollution and end the befouling of the Nation's rivers and other navigable waters. The Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1251 et seq.] (hereinafter, the "1972 Amendments") reworked the entire regulatory framework for water pollution control, vesting in the Federal Environmental Protection Agency ("EPA") the prime responsibility for developing and administering the mandated protective standards, and establishing for the first time the fundamental policy that "no one has the

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* The prefix "R." denotes references to pages of the Joint Appendix herein.

right to pollute" [Senate Report 92-414, p. 42]*. The Amendments dealt with all aspects of the water pollution problem, including the environmental impacts of filling operations. As to these, Section 404 [33 U.S.C. §1344] provided that no discharge of rock, spoil or other fill material could be undertaken without a permit from the Corps of Engineers, and that such a permit could only be issued if environmental protection guidelines were met and EPA approval was given.

The 1972 Amendments bore directly on Con Edison's plans at Storm King Mountain. There, as this Court is aware, the Company proposes, and the FPC has licensed,** a pumped storage

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* While styled as "amendments" to the earlier Federal Water Pollution Control Act, the 1972 Amendments in fact involved a complete rewriting of the old act, including the elimination of the earlier State-based regulatory framework, the substitution of EPA as the responsible agency, and the establishment of a completely new and comprehensive anti-pollution permit program.

** The FPC's initial licensing order [33 FPC 428] was set aside by this Court in 1965 [Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 cert. denied, 384 U.S. 941 (1966)("Scenic Hudson I"). However, the Commission relicensed the plant in 1970 [44 FPC 350], and this Court, in a divided decision, upheld the latter order [Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (1971) cert. denied, 407 U.S. 926 (1972)]("Scenic Hudson II"). As noted below, in neither of the FPC decisions and in neither of this Court's opinions were the issues raised by Section 404 considered.

project (the "Project") that would draw water out of the Hudson River into an upland reservoir at night and return it later to generate power (though at an overall loss of electricity since nearly 3 kilowatts of pumping power would be needed to return 2 kilowatts to the consumer) [R. 54a]. The principal facilities necessary to carry out these operations, consisting of a series of underground power chambers, the storage reservoir and a connecting two-mile water tunnel, would be constructed landwards of the River [R.9a]. But in addition, the Project would involve, within the Hudson itself for almost a mile along its shore, a massive filling operation. Specifically, some 47,000,000 cubic feet of rock, sand and other material would be excavated from the power-chamber and tunnel areas and then discharged (i.e., dumped) as fill material into the River immediately northwest of the plant site [R. 9a, 56a]. This dumping would create new land which would eventually be turned over to the Village of Cornwall for its use as a park; but at the same time, the filling would cover over some 40 acres of the River bottom and the life it supports and eradicate, among other things, valuable spawning and nursery areas [R. 9a, 14a-15a]. This, of course, is exactly the type of impact that Section 404 was intended to protect against.

Nor, as it has turned out, is the discharge of fill material at Storm King to be limited to the spoil site northwest of the plant site. During the proceedings below, Con Edison submitted an affidavit which mentioned a "cofferdam structure" to be used during construction [R. 55a-56a]. This affidavit did not describe the cofferdam as involving discharges of fill material similar to those at the spoil site. Now, however, in its brief to this Court (p.8), Con Edison has disclosed that this will be the case. Nor is that all. There is also to be a haul road, not before disclosed, that will involve still further filling in the Hudson River (Con Edison Brief, p. 8).

The filling operations relating to the haul road and cofferdam structure had not been dealt with in any way in the FPC proceedings on the Project; and while the riverfront park had been reviewed in terms of "recreation", the impacts of the filling, including effects on spawning and nursery areas, which are the principal concerns of Section 404, had not been considered at all [R. 112a]. Thus, the mandates of the 1972 Amendments were of prime relevance here, particularly in view of the expansive filling that was proposed. Nonetheless, when in the summer of 1973, Con Edison announced its intention to begin construction of the Project in November, it had not obtained a permit under

Section 404 and it clearly had no intention of doing so [R. 15a].

Several months earlier, the plaintiffs had written to the Corps of Engineers demanding that it hold Con Edison to the applicable permit requirements. These included, in addition to authorization under Section 404, permits that plaintiffs believed necessary for the dredging and filling operations under Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §403](the "1899 Act"). At one time -- in 1963 and then in 1965, after the FPC first licensed the Project -- Con Edison had in fact applied for such Section 10 permits, and the Corps issued three such permits. However, after the initial license was voided by this Court in Scenic Hudson I, these permits expired, and Con Edison had not sought to renew them [R. 13a, 84a-85a, 92a-101a]. By their letter, plaintiffs sought to ensure that the Corps would not stand idly by in 1973.

Notwithstanding its earlier issuance of Section 10 permits and the new mandates of Section 404, the Corps responded to plaintiffs' letter by stating that no permits of any kind were, in its view, required. The earlier Section 10 permits, it suggested, "may possibly have been issued in error", because, so it was asserted, the

Corps' Section 10 jurisdiction over hydro projects had been transferred to the FPC in 1920. As for Section 404 of the 1972 Amendments, the Corps claimed to have reviewed the Storm King proposal within the context of the new law, but stated that "[its] position remained unchanged..." [R. 11a, 34a]; and when, two months later, it promulgated new regulations clearly stating that Section 404 permits would be required for discharges of fill material in conjunction with FPC projects [33 CRF §209.120(c)(6) set forth at 38 Fed. Reg. at 12218 (May 10, 1973)], the Corps did not advise plaintiffs of any change at that time.

Faced, then, with Con Edison's announced intention to begin construction of the Project in November without either Section 10 or Section 404 permits, and faced as well with the Corps' rejection of the permit requirements they believed applicable, plaintiffs commenced the instant action on October 9, 1973, seeking a declaratory judgment that permits were required under both Sections and asking for preliminary and permanent injunctive relief against Con Edison until the permits were duly obtained. The Corps shortly responded by moving to dismiss the Section 10 claims for failure to state a cause of action. But as to the 404 claim, its position was far different. Having reviewed the complaint

and the applicable law, the Corps concluded that a Section 404 permit was, in fact, required for the filling operations at Storm King, and it so advised Con Edison by letter dated October 16, 1973 [R. 88a-89a, 105a]. On this basis, the Corps contended that the 404 issue was moot.

Needless to say, the issue was hardly moot for Con Edison which responded by moving for summary judgment against plaintiffs on all issues and by cross claiming for summary judgment against the Corps on the Section 404 question. Plaintiffs, in turn, cross moved for summary judgment in their favor, and the case was argued before Judge Lasker on the merits on November 1, 1973. At the request of the Court, the Corps subsequently submitted the affidavit of the Chief of its Regulatory Functions Branch, purporting to describe the Corps' "administrative practice" under Section 10 [R. 122a]; the plaintiffs filed an answering affidavit, seeking further discovery on the Corps' representations, shortly thereafter [R. 127a); and the case was thereupon submitted for decision.

C. The District Court's Decision and Judgment.

On December 28, 1974, Judge Lasker issued his decision in this case, holding that permits under Section 10

were not required for the work at Storm King, but that a Section 404 permit was prerequisite for the massive filling operations. Noting that the proposed discharges of dredged and fill material were, on their face, exactly the type of activity requiring a permit under the statute [R. 150a], the Court continued on to reject as without basis Con Edison's claim that there was a silent exception for FPC projects. Further, where, as here, Congress enacted a law which, on its face, was all-inclusive but for specifically-enumerated exceptions, it would be "improper", Judge Lasker concluded, for the courts to establish other exceptions of the proportions Con Edison urged [R. 154a].

On January 7, 1974, a judgment was entered, in the form proposed by Con Edison, (1) declaring that no Section 10 permits were necessary for the work at Storm King, but that Con Edison would be required to obtain a permit under Section 404 prior to commencing to discharge dredged and fill material into the Hudson, and (2) enjoining Con Edison "from discharging dredged or fill material into the Hudson River" unless and until an authorizing permit was issued under Section 404 [R. 159a]. On January 14, plaintiffs moved to amend the judgment to enjoin not only the actual discharge of fill material, but also the excavation activities by which the fill would be created [R.161a-

164a]. Both the Corps and Con Edison opposed the motion and, after oral argument, the motion was denied by Judge Lasker on January 28. Five weeks later, on March 4, 1974, Con Edison filed its notice of appeal [R. 179a], followed three days afterward by plaintiffs' notice of cross appeal [R. 18a]; and thus the issues come before this Court.

SUMMARY OF ARGUMENT

Con Edison proposes to discharge into the Hudson at Storm King Mountain some 47,000,000 cubic feet of waste rock and other fill material -- and it seeks to do so without a permit under the 1972 Amendments to the Federal Water Pollution Control Act. The District Court held that it could not do so, and that decision was correct.

In furtherance of the newly established policy that no one has the right to pollute, Congress, through Section 301(a) of the 1972 Amendments [33 U.S.C. §1311(a)], has made the discharge of <u>any</u> pollutant, including rock and other fill material, unlawful except -- and solely except -- as authorized by permits issued under the Amendments. Under Section 404, fill material may be discharged

-- but only pursuant to a permit issued by the Corps of Engineers, and then only in accordance with environmental protection guidelines developed in conjunction with, and subject to overriding review by, EPA. The massive discharges that Con Edison proposes clearly fall within the prohibitions of Section 301(a) and, as the District Court held, on their face require a permit under Section 404.

But Con Edison argues here, as it did in the District Court, that a further, silent exception, beyond the express exceptions set forth in Section 301(a), should be read into the 1972 Amendments for FPC-licensed projects. However, there is nothing in the Amendments or their legislative history to even suggest such an exception; and for the Courts to legislate one, as Con Edison urges, would run counter to the comprehensive nature of the Amendments and the Congressional intent to vest EPA (rather than the FPC or any other agency) with the ultimate authority over water pollution controls [33 U.S.C. §1251(d)]. Furthermore, to imply an exception here would run factually counter to the protections the 1972 Amendments seek. For despite all of Con Edison's ballyhoo regarding environmental review by the FPC, the fact is that the Commission never directed itself to the aquatic and related impacts of the proposed filling operations which are the express

concern of Section 404. This is exactly the type of gap Congress sought to fill in enacting the 1972 Amendments and vesting EPA with comprehensive authority for administering those Amendments.

Nor is there anything in the Federal Power Act which justifies the silent exception Con Edison asserts. Section 23(b) of the Power Act [16 U.S.C. §817] requires an FPC license for hydro plants on navigable waters, but the 1972 Amendments do not diminish this need; they simply add an additional requirement of general application to safeguard against adverse water pollution impacts. Similarly, Section 28 of the Power Act [16 U.S.C. §822], providing that amendments to the Power Act are not to affect the terms of prior licenses, has no application here. As the District Court stated, the 1972 Amendments are amendments to the Water Pollution Control Act, not to the Power Act. Furthermore, even if it were otherwise, the Section could hardly be deemed to apply since Con Edison has made no significant investment in reliance on its FPC license [see, e.g., People v. Miller, 303 N.Y. 105, 106 N.E. 2d 34 (1952)].

While the District Court correctly concluded that a Section 404 permit was required for the filling operations at Storm King, it limited the scope of injunctive relief to the actual discharge of fill material into the Hudson. Plaintiffs believe, and contended before the District Court, that the injunction should also have extended to the excavation activities by which the fill would be created, since this work would involve irretrievable commitments of resources that could not help but influence the decision under Section 404. The law of this Circuit and others clearly indicates that such restrictions on the decision-making process ought not to be allowed [Citizens Committee to Protect the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir., 1970), cert. denied 404 U.S. 949 (1971); Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir., 1971); Lathan v. Volpe, 455 F. 2d 1111, 1116 (9th Cir., 1971); Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir.,), cert. denied 409 U.S. 1000 (1972)]; and the District Court, should, accordingly, have broadened the scope of injunctive relief.

Finally, it is submitted that the District Court erred in rejecting plaintiffs' claims that Section 10 permits were required at Storm King. The Power Act does not, by its terms, repeal Section 10; and contrary to the

decision below, the legislative history supports the conclusion that the Corps of Engineers, was not stripped of its powers in respect of hydro plants. Further, the earlier administrative practice in this case -- where the Corps issued Section 10 permits for the Project after an FPC license was issued -- lends added support to the conclusion that permits are required now.

ARGUMENT

POINT ONE

THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT A SECTION 404 PERMIT IS NEEDED FOR THE FILLING OPERATIONS AT STORM KING MOUNTAIN

A. Section 404 Is Clearly Applicable Here.

There is no dispute that in conjunction with its Project at Storm King, Con Edison intends to discharge (or less euphemistically, dump) millions of cubic feet of waste rock and other fill material into the Hudson northwest of the plant site [e.g., R. 9a, 37a, 56a]. There is no dispute that this will cover over perhaps 40 acres of the River bottom [R. 56a].* There is no dispute,

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* Con Edison's engineer refers to the construction of a 57 acre park from the rock that will be "placed" in the Hudson [R. 56a]. However, the permit application submitted on January 11, 1974 to the Corps of Engineers shows that only about 40 acres of the Hudson will be filled, with the balance of the park resulting from the reuse of existing shorefront properties.

moreover -- at least based on the Company's recent disclosures -- that there will be further discharges of fill material to construct a temporary cofferdam and haul road [Con Ed Brief, pp. 7-8]. Yet for all of this , Con Ed contends that it is not bound by the provisions of the 1972 Amendments designed to control filling discharges.

In its efforts to avoid the application of the Amendments and Section 404 in particular, the Company glosses over and all but drops out of sight the comprehensive nature of the law, and the relevant statutory framework. But these are critical -- and they can be briefly described. Beginning with the principle that no one will any longer have a right to pollute [Senate Report No. 92-414, p. 42]*, Congress, through Section 301(a) of the 1972 Amendments, has made it unlawful for any person to discharge any pollutant into any of the Nation's waters, except as specifically allowed by the permitting sections of the Amendments; and to emphasize the scope

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* The Senate Report can be found beginning at p. 3668 of the 1972 U.S. Code, Congressional and Administrative News (92nd Cong., 2d Sess), and the final Conference Report (No. 92-1236) can be found in the same volume beginning at p. 3776. The entire legislative history of the 1972 Amendments, including all reports, memoranda, debate and the like have been compiled by the Congressional Service Committee, Library of Congress, in two volumes entitled A Legislative History of the Water Pollution Control Act Amendments of 1972, Serial 93-a, 93d Cong., 1st Sess. (Jan 1973).

of this prohibition, Section 502(6) [33 U.S.C. §1362(b)] defines "pollutants" with the broadest possible brush, including, as relevant here, "rock", "sand" and "dredged spoil", but beyond that, all kinds of garbage, sewage, heat, wrecked or discarded equipment, and solid, chemical, industrial and municipal wastes.* Thus, Congress, sought to develop a comprehensive control of all water pollution; and it carried these control efforts specifically into the area of filling operations through Section 404.

This Section, which is one of the two enumerated permitting sections in 301(a) pursuant to which discharges may be permitted, and the only one pursuant to which filling discharges can be allowed, provides as follows:

> "Sec. 404(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.
>
> "(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army, (1) through the application of guidelines developed by the Administrator [of the Environmental Protection Agency], in conjunction with the Secretary of the Army,

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* The texts of Sections 301(a) and 502(b) are set forth in Appendix A to this brief.

which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

"(c) The Administrator [of EPA] is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

At Storm King, of course, the discharge of waste rock as fill material is, by even the Company's admission, what is proposed northwest of the plant site; and under Section 502(6), that rock is defined as a "pollutant". Such being the case, the proposed discharges clearly appear to fall within the prohibitions of Section 301(a) and the consequent permit requirements of Section 404, as the District Court held.

Despite the unambiguous language of the 1972 Amendments, Con Edison urges this Court, as it urged the District Court below, to exempt FPC projects from the coverage of Sections 301(a) and 404 on the theory that the Congress did not intend the statute to apply in such cases. But there is, we submit, no basis for this position. There is not the slightest reference in Section 404 or any other provision of the 1972 Amendments to an exemption for FPC projects. To the contrary, Section 301(a), which establishes the basic prohibitions, is unambiguous and totally comprehensive in its scope and language: The discharge of pollutants, including rock and other waste material, is unlawful, except -- and solely except -- as permitted under specified sections of the 1972 Amendments. The specified sections include Section 404, which is equally unambiguous in requiring permits from the Corps for any discharge of dredged or fill material; but nowhere in those sections or elsewhere in the 1972 Amendments is there any exception for FPC projects or their accompanying pollutants.

In the light of the sweeping and unambiguous language of Section 301(a), with its precise definition of exceptions, Con Edison's attempt to imply a further exception, which is nowhere referred to in the Act, is without basis. Where Congress intended to provide exceptions to

the no-discharge declaration of Section 301, it did so expressly, including through Section 404. Under these circumstances, there is simply no warrant for the suggestion that FPC projects were to be exempt.

Faced with the absence of an exemption, Con Edison now argues that Congress did not know what it was doing (Con Ed Brief, pp. 25-26, 33-34). The principal concern, it asserts, leading to enactment of Section 404, was the necessity to control the disposal of materials dredged from ship channels, rather than regulation of both dredged and fill material. This being the case, and there being no evidence in the legislative history that Congress "thought about the relationship between the Federal Power Act and the [1972 Amendments],", the Company contends that Section 404 should not be applied to FPC projects (Id, pp. 24-26).

These arguments are, we respectfully submit, without merit. In the first instance, even if Section 404 were somehow read as not applying to FPC projects, this still would provide no answer to how Con Edison could escape the prohibitions of Section 301(a). There is, after all, within the anti-pollution provisions of that Section, no exception for the discharge of waste rock and fill pollutants other than

the permit requirements of Section 404.* Accordingly, if the discharge of waste rock were not subject to authorization under Section 404, it would be unlawful altogether under Section 301 or, in the alternative, still a further exception would have to be implied. There being no basis for even one exception, it would exceed credulity to imply still another.**

Similarly, there is nothing in the language of the 1972 Amendments or Section 404 to support Con Edison's contention that the real concern of Congress in enacting the latter section was limited to regulating the discharge of "dredged materials" scooped up in maintaining ship channel. To the contrary, as the District Court stated,

> "... the invalidity of this position is demonstrated by a simple reading of the section, since, if Con Ed's assumption were correct, §404 would prohibit only the discharge of 'dredged materials', i.e., materials dredged out of ship channels, whereas

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* See, e.g., Conf. Report No. 92-1236 at pp. 142-3, which states that "failure to obtain a permit under this Section [404]...would be a violation of Section 301(a)...," evidencing the integral relationship between Section 404 and the discharge prohibitions set forth in Section 301(a).

** In its opinion, the District Court noted that Con Ed was asking that there be read into the 1972 Amendments "a double exemption" under both Sections 404 and 301. However, since the court found Section 404 to apply, it did not "speculate ... about how Con Ed would avoid the ban of §301(a) if we were to find §404 to be inapplicable" [R.151a]. In its current brief, the Company offers no answer.

> by its own terms it covers 'dredged and fill materials.' To assume that Congress meant nothing by the use of the word 'fill' in addition to 'dredged' would be unwarranted, especially since the original [version of] the Amendments referred only to 'dredged spoil' (S.2770, 92d Cong., 1st Sess., §402(m)), 'fill' having been subsequently inserted." [R.152a].

Furthermore, while in the Senate-House Conference Report on Section 404, there are several references to dredging in navigation channels, these references, as the Corps noted before the District Court, in no way suggest that the Section is limited to such operations or, indeed, primarily directed toward them. To the contrary, any such interpretation would render meaningless the immediately succeeding paragraphs of the Conference Report (referring to discharges of both dredged and fill material), including, in particular, the final paragraph of the Report recognizing the authority of the EPA Administrator to prohibit the dumping of "any dredge or fill material which he determines will adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreation areas" [Conf. Report No. 92-1236, p. 142]. The factors listed above are, of course, no less relevant to filling operations where waste rock is the pollutant in issue than they are when dredged spoil is involved; and there is nothing to suggest that Congress was

not equally concerned with the impacts of both.

As for the claim that Congress may not have actually thought about the relationship between the 1972 Amendments and the Power Act, this may be true (although the specific reference to the FPC in §102(b)(6) of the Amendments [33 U.S.C. §1252(b)(6)] suggests that it is not). However, even if it is, that in no way suggests that Congress meant to -- or would have sought to -- exempt FPC projects from the coverage of the Amendments. On the contrary, the basic purposes and administrative format of the Amendments compel exactly the opposite conclusion.

The purposes, as stated in Section 101(a), are "to restore and maintain the chemical, physical and biological integrity of our Nation's waters" [33 U.S.C. §1251(a)]. To this end, Congress established, as the heart of the water control program, the anti-pollution prohibitions and the comprehensive permit system that begins with Section 301(a) and includes Section 404*; and in recognition of its special expertise in the area, the Environmental Protection Agency has been vested with complete authority for the administration

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* See Environmental Quality, The Fourth Annual Report of the Council on Environmental Quality (Sept. 1974), pp. 168, 174; and Senate Report No. 92-414, pp. 8, 42-43.

of the program "except as otherwise expressly provided in this Act." [33 U.S.C. §1251(d)]. In short, whatever the roles of other agencies, when it comes to water pollution control -- meaning controls on all discharges -- EPA is to exercise the authority unless otherwise expressly provided in the Amendments themselves.

There is, of course, no exception -- either express or implied -- set forth for FPC projects. However, consistent with the overriding purpose and administrative framework of the 1972 Amendments, EPA is given the express authority and, indeed, the responsibility to review proposals for dumping rock and other fill materials in the Nation's waters, and to veto any such proposals where biological and other environmental impacts would be unacceptable . This is key -- ensuring that in the area of filling, just as in the case of other discharges, the control of pollution and the protection of the environment will be the responsibility of the agency best geared to do the job (and, frankly, in the eyes of Congress, most committed to doing the job). Were, however, an exception now to be carved out, as Con Edison urges, for FPC projects, the comprehensive control of pollutants, and the role of EPA in that regard, would be breached. There is nothing in the 1972 Amendments or their legislative history that can possibly be said to warrant a result so contrary to

the scope and purposes of the Act, and for the Company to suggest that Congress intended as much can only be regarded as an exercise in wishful thinking.

The fact is, of course, that what Con Edison is really asking this Court to do is to judicially legislate a special exemption for FPC projects. This appears quite clearly from the Company's plaintive citation to a situation where, as Con Ed puts it, "Congress did foresee a conflict" -- namely in deciding that the AEC, rather than EPA, should have jurisdiction over discharges of "special nuclear" materials (Con Ed Brief, p. 33). From this the Company concludes that if Congress had anticipated a conflict with the FPC, "it would no doubt have resolved it in a manner similar to that involving the AEC, and expressly preserved the FPC's exclusive jurisdiction." (Id, p. 34). But the situations are entirely disparate in two critical respects.

In the first instance, the AEC has an admittedly special expertise in the area of nuclear materials, whereas the FPC has no corner at all, or special expertise, on the aquatic or other impacts of filling. Thus, Con Edison's easy assumption that Congress would have acted similarly here is without basis -- and particularly so in light of the Congressional determination to end the desecration of the country's

waters. Furthermore -- and of controlling importance -- in the case of the AEC, Congress acted expressly; here, by contrast, Con Edison would have this Court act instead in the legislative capacity. Clearly, this is not permissible. As the District Court stated in refusing to read into the 1972 Amendments the same exemption for FPC projects that Con Edison again urges here:

> "Without any indication that Con Ed's reading of the Congressional will [to exempt FPC projects] is accurate, the carving out of so major an exception would be improper. If this was Congress's intention and the omission is mere oversight, the remedy rests in Congress's hands." [R. 154a].

We do not believe that Congress did, in fact, intend any such exception; to the contrary, we submit that in adopting the comprehensive act that it did, Congress meant to provide protections against all unreasonable pollution, including the sort that would follow from the massive filling operations at Storm King. But in any event, where, as here, all that Con Edison can put forward in support of its claimed exemption is Congressional silence, it is apparent that that will not do. The 1972 Amendments call for a Section 404 permit for the discharge of fill material, and there is no basis for

excepting the 40 acres of filling at Storm King.*

B. The Power Act Does Not Foreclose Application of the 1972 Amendments to the Filling at Storm King.

Rather than come to grips with the comprehensive nature and mandates of the 1972 Amendments, Con Edison, in its brief, instead lays its principal emphasis on the Federal Power Act adopted in 1920. The Company's basic proposition in this regard is that the Power Act confers exclusive jurisdiction on the FPC, and the Amendments ought not to be read as adding any requirements which would involve another agency.

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* It should also be noted that the Corps of Engineers' regulations promulgated in May 1973 provide, with specific reference to plants licensed by the FPC, that:

> "In all cases involving the discharge of dredged or fill material into navigable waters ..., Department of the Army permits under Section 404 of the Federal Water Pollution Control Act...will be required." [33 CFR §209.120 (c)(6), as proposed at 38 Fed. Reg. 12217-8 on May 10, 1973].

It is thus clear that the Corps, even before the commencement of this action, believed Section 404 to be applicable to FPC projects; and it confirmed that view in this case by supporting plaintiffs' 404 claim. This interpretation by the Corps, which is undoubtedly concurred in by EPA, is entitled to great weight. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961). By contrast, the FPC has not asserted an opposite position, leaving only Con Edison to vindicate a position that no one else apparently supports.

At the outset, of course, this argument by Con Edison is simply a continuation of its plea that a special exemption from the 1972 Amendments be created by this Court for FPC projects. As we have indicated previously, this is a position which cannot be justified given the comprehensive scope and unambiguous language of the Amendments, and which could not in any event bear judicial (as distinct from legislative) fruit. Nor are these the only limitations to the Company's position.

There is no question, for example, that Section 23(b) of the Power Act prohibits the construction of hydro-electric projects on navigable waters unless a license is obtained from the FPC. But the 1972 amendments do not revoke this requirement; nor, we submit, do they, as Con Edison claims, diminish the authority of the FPC within the meaning of Section 511(a) of the Water Act [33 U.S.C. §1371(a)].* To the contrary, the

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* Section 511(a) provides in pertinent part that the 1972 Amendments "shall not be construed as (1) limiting the authority or functions of any other officer or agency of the United States under any other law or regulation not inconsistent with this Act...". This, of course, is a standard savings clause to ensure that parallel protections are not wiped out, but Con Ed would use it as the basis for exempting FPC projects generally from the coverage of the Amendments. Clearly, this was not the Congressional intent, and as noted in the text, there is no other support for the Company's claims.

Amendments simply add an independent requirement of general application that the operations of hydro plants, like all other facilities, be so conducted as to avoid undue pollution in accordance with the Congressional directives included in the new law. In this respect, there is no inconsistency between the 1972 Amendments and the Power Act, but both became enforceable in respect of hydro plants.

Con Edison, however, would have it that the "exclusive jurisdiction" of the FPC bars any consideration elsewhere not only of those questions that the Commission is obligated to consider, but issues such as water pollution over which it was given no mandate. In other words, FPC projects, as distinct from all others, would be excepted from new laws of general application such as the 1972 Amendments, and thereby exempted from the exigencies of changing times as if frozen into the 1920's. But this would make no sense at all. The exclusive jurisdiction of the FPC could hardly be deemed to extend to areas which have only in the past two years become the subject of comprehensive Federal regulation, and correlatively, that jurisdiction is not impaired when laws are adopted dealing with such areas. The new requirements are additive to the Power Act's, in short, and not, as Con Edison would have it, in limitation of the FPC.

Furthermore, to the extent that there is any inconsistency between the Power Act and the 1972 Amendments, the Amendments must clearly prevail under Section 511(a). In this connection, Con Edison attempts here, as it did before the District Court, to create its own concept of consistency by suggesting that the FPC has "ample authority" to deal with pollution problems, and thus that the 1972 Amendments should not be applied to hydro projects (Con Ed Brief, pp. 31-33). But this interpretation, casting aside the comprehensive coverage of the Amendments and implying a single special exception, would indeed be "inconsistent" within the meaning of Section 511(a), and thus require the FPC to give way, because, as the District Court stated,

> "...although under the Power Act the FPC can perhaps accomplish everything sought by the Amdnements, it is not obligated to do so by the Power Act itself. In fact, Con Ed points to no Power Act provision that would require the FPC to satisfy literally or even substantially the demands of §404. On the other hand, §404 conditions discharge of dredged or fill materials on approval by two federal agencies, granted pursuant to specific guidelines designed to protect the environment. Their approval is mandatory under the 1972 Amendments, whereas FPC compliance with §404 would be merely voluntary. To this extent, the Acts are inconsistent." [R. 153a].

Nor could any case better illustrate the pertinence of the District Court's observations, and the hollowness of Con Edison's exemption claims, than this one. For the

fact is that, in spite of all the Company's contentions regarding the FPC's "ample authority", and despite the asserted comprehensive scope of the environmental review in this case, the FPC, in all its hearings and considerations, never directed itself to the aquatic or other impacts of the massive dumping operations at Storm King which are the specific concerns of Section 404.* This, we submit, is exactly the type of gap that Congress sought to fill in enacting the 1972 Amendments and in vesting EPA with comprehensive authority for administering those Amendments. For Con Edison now to claim that FPC review was sufficient and was so recognized by Congress is not only to read into the 1972 Amendments an exemption that simply is not there -- it is to misrepresent the role that the FPC has played. EPA, by contrast, has never had the chance to pass on the Project at all since it did not even exist at the time the FPC issued the license.

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* As appears from the quotation from deRham v. Diamond [32 N.Y. 2d 34 (1973)] set forth at page 9 of Con Ed's brief, in the New York water quality hearings, the filling operations were briefly considered in terms of turbidity. However, the fundamental concerns reflected in Section 404, including impacts on spawning and nursery grounds, were not dealt with at all; and of equal importance, no Federal or State agency made any analysis or even appeared at the hearings.

C. Con Edison Has No Vested Right to Discharge Dredged and Fill Material.

Con Edison also argues on this appeal, as it did in the District Court, that whatever the application of the 1972 Amendments to hydro projects generally, it may nonetheless discharge the 47,000,000 cubic feet of fill material that it proposes without a permit because (i) the Amendments postdated the Storm King license, and (ii) the Power Act provides that "amendments thereto shall not retroactively affect the rights of licensees under previously issued licenses" (Con Ed Brief, pp. 21-23).

The argument is based upon Section 28 of the Federal Power Act, providing that:

> "The right to alter, amend, or repeal... [the Power Act] is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder."

The argument was considered and rejected by Judge Lasker:

> "The answer to Con Ed's argument that the 1972 Amendments to the Federal Water Pollution Control Act cannot, because of this section, affect its rights under a previously issued FPC license is that the Amendments are amendments to the Water Pollution Control Act and not to the Federal Power Act. The Amendments constitute law of general application

> which affect FPC licensees no more than any other economic group. We believe that §28 was not intended to insulate FPC licensees from the effect of general Congressional legislation for the term of their licenses, but only to protect them from ex post facto law making relating specifically to FPC license requirements." [R. 157a](emphasis added).

On this appeal, Con Edison cites no judicial authority or statement of legislative intent to impeach Judge Lasker's ruling and sustain its vested rights claim. The only citations are to the "testimony of Mr. O. C. Merrill, a principal draftsman of the Power Act", to the effect that in his opinion, Congress "should not have the authority to pass subsequent legislation that will modify the contract already issued" (Con Ed Brief, p. 22-23). In itself, of course, Mr. Merrill's statement could hardly be held to override the clear language of the statute which extends only to amendments of the Power Act. But were there any doubt, it is put to rest by the comments of Representative Esch which, while following immediately upon Mr. Merrill's statement, were not mentioned in Con Edison's brief. Thus, the entire colloguy was as follows:

> Mr. Esch: "...do you think that Congress can pass no Act within 50 years [the term of a license] that will affect the license or add to its provisions?"
>
> Mr. Merrill: "I think that it should not have authority to pass subsequent legislation that will modify the contract already issued."

To which Mr. Esch then responded:

> Mr. Esch: "Of course, the State can not pass an act to affect the contract, but that is a limitation on the State and not on the Federal Government." [Hearings on S. 1419 Before the House Water Power Committee, 68th Cong., 2nd Sess., at 73] (emphasis added).

Of course, the notion that the 66th Congress acting in 1920 contracted with power companies in general to enact no subsequent legislation that would bind them is hardly worthy of consideration. And the implied proposition that the 92nd Congress, in enacting in 1972 one of the three most important congressional acts* dealing with the environmental crisis which came about a half a century later, was bound by a contract authorized by Congress in 1920 is of even less weight. The sovereign power to protect the general welfare, which is clearly the basis upon which the 1972 Amendments were enacted, can hardly be deemed to have been so lightly or so absolutely bartered away [See, e.g., Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, 436-7 (1934); Stephenson v. Benford, 287 U.S. 251 (1932).

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* The other two are: The National Environmental Policy Act, 42 U.S.C. §4321 et seq., 83 Stat. 852; and The Clean Air Amendments of 1970, 42 U.S.C. §1857 et seq., 84 Stat. 1676.

Furthermore, even if Con Edison's expansive reading of Section 28 were otherwise to be taken as valid, we respectfully submit that it should not and could not be applied to foreclose application of Section 404 here. According to Con Edison's view, the whole purpose of Section 28 was to safeguard investments that have been made in reliance on an FPC license and thus to encourage private financing of water power projects (Con Ed Brief, pp. 21-22). But this is not the situation that prevails here. To the contrary, of the Project's total estimated cost of $541 million, less than $25 million had been expended when this action was brought [R. 59a], and none of this, as far as we are aware, was raised on the basis of any representations regarding its use for the Project. Of even greater importance, of the $25 million spent through September 1973, the major portion -- indeed, more than $19 million it appears -- had been spent not in reliance on a license, but before the FPC issued its August 19, 1970 order authorizing the Company to proceed [R. 116a].* Under these

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* According to Con Edison Annual Report of 1969 filed with the FPC [Form 1], at December 31, 1969 -- eight months before the final license was issued -- the Company had invested $18,325,000 in the Project. Adding to this interest charges alone, it is apparent that the investment by Aug. 19, 1970 was more than $19 million. Furthermore, of the $6 million incurred since the license was issued, it appears than $3.5 million represents interest incurred on the pre-existing investment [R.60a, showing interest charges of $108,000 a month which, over 3 years, would total $3.9 million].

circumstances, and given the fact that construction had not commenced either when the 1972 Amendments were passed or when this action was initiated,* it would, we submit, be unreasonable to allow Section 28 -- which on its face does not apply -- to be invoked, to the exclusion of Section 404, when to do so would not vindicate the purposes of the Section 28, but would only serve to subject the Hudson River to potential pollution of the very type that Congress is seeking to prevent.**

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* For all practical purposes, the Company has not yet started construction. Its only site work to date has consisted of some tree cutting and limited bulldozing which was initiated 2 weeks ago despite the pendency of this and other actions.

** In its brief (pp. 28-29), Con Edison places considerable emphasis on the asserted fact that the Company could have gone ahead with construction of the Project following the FPC's August 19, 1970 licensing order, and that if it had done so and undertaken the filling operations at that time, Section 404 would not have applied because it had not yet become law. This contention ignores the fact that Con Edison did not move forward, and in the time that has passed since then, Congress has enacted new protections for the country's waters. Furthermore, contrary to the Company's claim, it was not in a position to proceed with construction in August 1970 -- or at any time prior to enactment of the 1972 Amendments. Under Article 33 of its license, Con Edison could not begin construction until there were first submitted to and approved by the FPC the final designs of the project works [R. 57a]. This was not done until February 5, 1974 (Con Ed Brief, p. 15) -- long after the 1972 Amendments had taken affect, some four months after the action was brought, and one month after Judge Lasker issued the injunction in this case.

In an analagous area -- that involving non-conforming uses, where land is used for a purpose prior to the enactment of a new law which makes the use unlawful -- there would clearly be no basis for a claim of vested right here. This is the case because the protection of non-conforming uses extends only to situations where there has been, prior to the enactment of the new law, substantial construction of improvements upon the land subject to the new regulations [See, e.g., People v. Miller, 304 N.Y. 105, 109, 106 N.E. 34 (1952)]. Here, of course, Con Edison had begun no construction at all at the time the 1972 Amendments were passed or, indeed, when this action was commenced; and such being the case, there would be no basis for allowing it to proceed free of the Amendments even if Section 28 were read in the expansive (and unsupported) fashion that the Company urges.

The District Court was, we submit, clearly correct in holding that Con Edison had no right -- vested or otherwise -- to discharge fill at Storm King

free of the requirements of the 1972 Amendments.*

POINT TWO

THE DISTRICT COURT ERRED IN LIMITING INJUNCTIVE RELIEF TO THE ACTUAL DISCHARGE OF FILL MATERIAL

In its December 28 Decision, the District Court, after holding that Con Edison was required to obtain a Section 404 permit, continued on to grant "plaintiffs' motion for summary judgment ...[for] declaratory and permanent injunctive relief...as to §404..." [R. 157a].

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* In responding to Con Edison's arguments, we have accepted the Company's premise that the filling operations at Storm King all involve the construction of project works "mandated" by the Company's FPC license. In fact, however, we are aware of nothing in the license or in the hearing record that constitutes the haulroad or the cofferdam structure "mandated project works". Furthermore, to the extent the so-called waterfront park is defined as such, it can be so classified only because the Company asked to build it. In reality, of course, the "park" is simply an economically-convenient waste heap, rather than an integral Project work; and this is underscored by the fact that the finished facility will not be retained by Con Ed, but conveyed to the Village of Cornwall for its use [FPC Opinion No. 584, 44 FPC at 362]. Moreover, contrary to the Company's claim that the park will continue as a "project structure", the License indicates that it will not, since its definitions include only those lands "owned or held by the Licensee..." [44 FPC at 430]. The park, of course, will be neither owned nor held by Con Ed, but will belong to Cornwall.

By their motion, plaintiff had in fact asked for an injunction against construction activities of any kind [R. 106a, 31a-32a]. However, the judgment signed by Judge Lasker limited the injunctive relief to the actual discharge of dredged or fill material [R. 160a].

Plaintiffs thereafter moved to amend the judgment to expand the scope of injunctive relief so that it would cover, in addition to actual discharges of fill material, any activities resulting in its creation [R. 161a-165a]. However, the District Court denied the requested relief [R. 178a].

It is respectfully submitted that the District Court erred in limiting the scope of injunctive relief as it did. In this connection, plaintiffs recognize that an injunction prohibiting all Project construction would probably have been too broad in light of the Corps' limited jurisdiction under Section 404. However, no such relief was sought by the motion to amend -- nor is it sought by this appeal. Rather, what plaintiffs seek is a prohibition on Con Edison solely with respect to activities directly related to the discharge of dredged or fill materials.

We submit, however, that such activities are not limited to the actual discharges of fill materials, but

also include the rock excavation which results in the creation of the fill and thus, of necessity, requires its subsequent discharge. For if these latter activities are not prohibited, the decision under Section 404 could well be turned into a hollow gesture. For example, under the judgment that the District Court signed, Con Edison, without violating the injunctive clause, could undertake major rock excavation, at vast expense, and with tremendous amounts of resulting fill material, before a Section 404 permit was obtained. At this point, of course, before the issuance of a permit, the Corps and EPA should have open minds. But with the fill already a reality, and with Con Edison claiming, as it already has, that the Hudson is the only economical disposal site [R. 56a-57a; ¶22], the consequences of such excavating activities would be to place tremendous pressure on both agencies to allow the dumping operations, whatever the environmental consequences.

Such an incongruous result, whereby the freedom of the Corps and EPA to decide against the fill operations would be severely restricted -- whereby, in short, there would be an irretrievable commitment of resources that could not help but influence the decision -- ought not to be permitted here. Under similar circumstances involving the proposed construction of the Hudson River Expressway,

this Court had held that review authority in the Secretary of Transportation could not and should not be frustrated by allowing the Highway to proceed, when to do so would limit the Secretary's ability to reject the proposal [Citizens Committee to Protect the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir., 1970), cert. denied 404 U.S. 949 (1971); and there have been a number of similar holdings under the National Environmental Policy Act [e.g., Lathan v. Volpe, 445 F.2d 1111, 1116 (9th Cir., 1971); Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir., 1971), cert. denied, 409 U.S. 1000 (1972); and see Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1128 (D.C. Cir., 1971)].* The reasoning of Citizens Committee and the other cited cases are equally applicable here, and they should be followed by enlarging the scope of the injunction in this case to cover the creation, as well as the actual discharge, of the rock and other fill material proposed for dumping

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* It should be noted that in its notice of the filing by Con Edison of a Section 404 application, the Corps indicated that a supplemental impact statement under NEPA would probably be prepared [Corps Public Notice No. 7549, dated Feb. 26, 1974]. In the light of the NEPA cases cited in the text, this tends to further underscore the importance of avoiding irreversible commitments of resources before the NEPA balancing is undertaken.

at Storm King.

We emphasize in connection with the foregoing that the broadened form of injunctive relief would not prevent Con Edison from going forward with construction of the Project. Work on the reservoir would, for example, in no way be impaired, nor would any other activities unrelated to the filling operations. The limitations, in short, would be only those necessary to ensure that the required Section 404 decision would not be prejudiced.

POINT THREE

PERMITS UNDER SECTION 10 OF THE 1899 ACT ARE ALSO REQUIRED FOR DREDGING AND FILLING OPERATIONS AT STORM KING

Section 10 of the 1899 Act prohibits any unauthorized obstructions to the navigable capacity of any waters of the United States, and makes it unlawful to excavate materials from (i.e., dredge), or to fill or otherwise alter the condition of, the channel of any navigable River, except with the approval of the Secretary of the Army upon the recommendation of the Chief of Engineers [33 U.S.C. §403]. This Section has been given a broad reading by the courts [e.g., U.S. v. Republic Steel Corp., 362 U.S. 482 (1960)]

and, by its terms, appears to apply to the work that Con Edison proposes at Storm King (which, in addition to the massive filling, also involves significant dredging at the Project's intake). However, the District Court concluded that Section 10 permits were not in fact required, accepting in this regard the claims of both Con Edison and the Corps that the latter's usual Section 10 jurisdiction had, in the case of hydro plants, been superceded and transferred to the FPC by the Federal Power Act of 1920.

In reaching its conclusion, the District Court acknowledged that the specific language of the Power Act did not compel this result; for example, Section 29 thereof [16 U.S.C. §823], repealing "[a]ll Acts or parts of Acts inconsistent with [the Power Act]" clearly did not repeal Section 10 as a whole; nor could it be said that a continuing exercise of jurisdiction by the Corps, correlative to that of the FPC, was inherently inconsistent [R. 141a]. However, drawing on the legislative history of the Act, the Court concluded that the intent of Congress had been to vest the full Federal licensing authority in the FPC, and to do away with any separate licensing requirements under Section 10.

We respectfully disagree. The Power Act, without doubt, sought to achieve a comprehensive approach to licensing; and as the original Commission consisted of the Secretaries of War [Army], Interior and Agriculture, the coordination of their functions and work was clearly in order [House Rep. No. 61, 66th Cong., 1st Sess., at 5, set forth in relevant part at R. 142a]. However, the fact that the Secretaries' work was coordinated when they sat as the FPC does not imply that the historical role of the Secretary of War under Section 10 was brought to an end. To the contrary, a good deal of the testimony on the Water Power Act imports to exactly the opposite conclusion.

Thus, in the House Hearings on the Water Power Act, Mr. Merrill, identified by Con Edison as one of the principal draftsman of the Act, noted that the Secretary of the War's powers over navigational matters, including "the approval of structures that go across navigable streams, which under the law at the present time are within the joint jurisdiction of the Chief of Engineers of the Army and the Secretary of War," were to be continued; and in clarification a moment later, Representative Hamilton stated:

> "The commission acts subject to the powers already vested in the Secretary of War, and those powers are not taken away from the Secretary of War."

To which Mr. Merrill responded that the Secretary's special powers over navigation "were not intended to be taken away". [Hearings Before House Committee on Water Power (March 19, 1918), 65th Cong., 2d Sess., at pp. 105-06].

Similarly, at a later point in the hearings, Secretary of Agriculture Houston (who was Mr. Merrill's boss) noted with respect to the Power Act and the continuing responsibilities of the Secretary of War, among others, as follows:

> "If I am not mistaken the provisions in the proposed measure [the proposed Power Act] are more restrictive than existing law, in that they require the assent of three heads of departments and also the assent of the department immediately charged with that Government interest". [Ibid. at 684] (emphasis added).

The foregoing observations indicate that the agencies which took the lead in drafting the Power Act believed that the Secretary of War would maintain his historical authority. Of course, as long as the Secretaries were the Commission, there was no need to exercise the separate powers outside of the FPC. But when, in 1930, the

Secretaries were replaced with an "independent" five-man commission [46 Stat 797 (Jun. 23, 1930, c. 572)], those powers once again assumed importance; and there is not the slightest indication that they were intended to disappear.

In this case, of course, the Corps did, in fact, exercise its separate Section 10 authority, issuing three permits to Con Edison between 1963 and 1965 (including two after the initial FPC license was granted) for essentially the same work involved now. But those permits having expired, the Corps reversed its earlier position, and before the District Court successfully contended that it was all a mistake. We submit, however, that in the light of the legislative history cited above, the issuance of those earlier permits was not in error, but served to verify that the Corps' Section 10 authority was not surrendered -- or deemed surrendered -- to the FPC.*

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* The District Court rejected our position that the earlier permit issuances reflected a consistent administrative practice, relying in this regard on (1) the fact that the Corps amended its regulations in 1968 to disclaim a Section 10 role for itself over FPC projects and (2) an affidavit from James DeSista, Chief of the Corps' Regulatory Functions Branch, purporting to describe the the Corps' historical practice. However, the change of regulations in 1968 obviously did not speak to historical administrative practice since 1920; and as for Mr. DeSista's affidavit, it cited to no regulations before 1968 evidencing a disclaimer of jurisdiction and was, we submit, generally inadequate [See Supplemental Affidavit of A. K. Butzel, R.127a]. Indeed, all that one can fairly glean from Mr. DeSista's affidavit is that the Project at Storm King is not the only hydro plant for which Section 10 permits have been issued [R. 148a]. Unfortunately, Mr. DeSista made no survey to determine the other instances.

In summary, the simple facts are that (1) the Federal Power Act did not, by its terms, transfer the Corps' Section 10 permitting authority to the FPC; (2) the legislative history of the Power Act does not support the proposition that it did; and (3) there is no inherent conflict between Section 10 and the Power Act. Under these circumstances, and in view of the administrative interpretation reflected by the prior issuance of permits for this very Project, we respectfully submit that Section 10 must be deemed to apply to Con Edison's proposed dredging and filling at Storm King.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed in respect of Section 404, but the scope of injunctive relief should be broadened. The judgment of the District Court as to the application of Section 10 should be reversed and that Section held applicable to Con Edison's dredge and fill activities at Storm King Mountain.

Dated: New York, N.Y.
April 22, 1973

Respectfully submitted,

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APPENDIX A

Section 301(a) [33 U.S.C. §1311(a)]

"Sec. 301.(a) Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

Section 502(6) [33 U.S.C. §1362(6)]

"Sec. 502. Except as otherwise specifically provided, when used in this Act:

* * *

"(6) The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for the disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources."

CERTIFICATE OF SERVICE

I hereby certify that 25 copies of the foregoing Brief on behalf of the Plaintiffs-Appellees-Appellants, are being sent today, April 22, 1974, post-paid, properly addressed, first class mail, to the Clerk, United States Court of Appeals for the Second Circuit, U.S. Courthouse, Foley Square, New York, New York 10007. I further certify that two (2) copies each of the said Brief were served today, April 22, 1974, by first class mail, properly addressed, on counsel for Con Edison and Government-Appellees as follows:

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